

BC Towing and its insurance carrier, Workers Compensation Fund (referred to jointly as "BC" hereafter), ask the Utah Labor Commission to review Administrative Law Judge Lima's preliminary award of benefits to K. L. under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63-46b-12 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

While working for BC on March 3, 2001, Mr. L. was assaulted and severely injured. BC accepted liability for Mr. L.'s injuries under the workers' compensation system and paid some medical and disability benefits. On June 7, 2004, Mr. L. filed an application with the Commission to compel BC to pay additional benefits, including permanent total disability compensation.

Judge Lima held an evidentiary hearing on Mr. L.'s claim on December 10, 2004. On May 31, 2005, she issued her decision finding Mr. L. was entitled to a preliminary determination of permanent total disability. The decision ordered BC to pay subsistence benefits beginning September 13, 2003, and allowed BC 30 days to elect whether to submit a rehabilitation/reemployment plan for Mr. L.. Judge Lima's decision also set Mr. L.'s temporary total and permanent partial disability compensation rate at \$205 per week, rather than the rate of \$195 per week that BC had previously paid.

In requesting Commission review of Judge Lima's decision, BC contends that Mr. L. is not permanently and totally disabled within the meaning of § 34A-2-413(1) of the Act. In support of its position, BC raises the following specific arguments:

- Judge Lima's decision fails to address Mr. L.'s loss of his recent employment with Standard Plumbing;
- Mr. L. has failed to satisfy several of the elements set forth in § 413(1) as prerequisites to a finding of permanent total disability;
- Even if Mr. L. has satisfied § 413(1)'s requirements for permanent total disability and is, therefore, entitled to subsistence benefits, Judge Lima erred in directing that such payments begin on September 13, 2003; and
- Judge Lima erred in increasing the weekly rate of Mr. L.'s temporary total and permanent partial disability compensation from \$195 to \$205 per week.

FINDINGS OF FACT

The Commission notes that Mr. L. was the only witness called to testify at the evidentiary hearing. Similarly, the relevant medical evidence consists almost entirely of the opinions of Mr. L.'s treating physicians. Based on this evidence, which BC has not controverted with contrary evidence, the Commission makes the following findings of fact. The Commission also adopts

Judge Lima's findings of fact to the extent they are consistent with these findings.

Mr. L. was born in 1958 and is now 48 years old. He left high school mid-way through his sophomore year. He did not obtain a G.E.D. and has no other formal education or training. Prior to his work injury, he had borderline intellectual functioning and a developmental reading disorder. These pre-existing conditions constituted a permanent 13% whole person impairment.

In earlier years, Mr. L. attempted to work as a building equipment maintenance person, but was unsuccessful. He worked for a bottling company, but was discharged in a reduction of force. He then found employment as a tow truck driver and worked in that capacity for 14 years.

On March 3, 2001, while employed by BC and in the process of towing an illegally parked vehicle, Mr. L. was attacked by four men who were somehow associated with the vehicle. These men beat Mr. L. with a baseball bat, shattering several bones on the left side of his face and leaving him unconsciousness. Mr. L. was hospitalized and underwent surgery to repair various fractures.

As a result of the foregoing work-related injuries, Mr. L. suffers from mild optic neuropathy in his left eye, traumatic brain injury, migraine headaches, acute stress disorder and major depressive disorder. These work-related conditions constitute a 14% whole person impairment in addition to Mr. L.'s pre-existing 13% impairment. Mr. L. has difficulty retaining information, understanding instructions or completing tasks. He fears going out in public. He uses his basement as a refuge and doesn't leave his home for several days at a time. He cannot return to work as a tow truck driver or perform other similar work. Furthermore, Mr. L. will require professional treatment to improve his psychiatric condition before he can return to gainful employment.

Since he was injured at work, Mr. L. has had one period of employment. With vocational assistance through an Easter Seals program, Mr. L. worked as a delivery person for Standard Plumbing Supply. Specifically, a representative from Easter Seals was aware of the job opening at Standard Plumbing Supply. This representative helped Mr. L. prepare his resume and then accompanied Mr. L. to his interview. Mr. L. began work during May 2003. However, he had difficulty pulling orders and plotting his delivery route. Mr. L.'s supervisor provided special assistance on these tasks and helped Mr. L. mask his deficiencies. Mr. L. would not have been able to perform his duties at Standard Plumbing without this support from his supervisor. Mr. L. worked full-time for Standard Plumbing Supply for five months. Then, in mid-September 2003, he was required to take a drug test. He tested positive for marijuana use and was fired for that reason.

Since losing his job with Standard Plumbing Supply, Mr. L. has been unemployed. He has examined job postings at the Department of Workforce Services, but has not found any positions that he believes he could perform. The Social Security Administration has recently determined Mr. L. to be totally disabled.

DISCUSSION AND CONCLUSIONS OF LAW

The Utah Workers' Compensation Act provides medical benefits and various forms of disability compensation to employees injured in work-related accidents. In this case, there is no dispute that Mr. L.'s work-related injuries are compensable under the workers' compensation system. The only issues that are in dispute are whether Mr. L. is entitled to a preliminary determination of permanent total disability, and the amount and duration of his disability compensation.

Judge Lima concluded Mr. L. is entitled to a preliminary finding of permanent total disability and awarded subsistence benefits as of September 13, 2003. As already noted, BC challenges Judge Lima's decision on the grounds that: 1) Judge Lima's findings of fact are incomplete; 2) Mr. L. has failed to meet several of § 413(1)'s requirements for a preliminary determination of permanent total disability; and 3) even if Mr. L. is entitled to a preliminary finding of permanent total disability, Judge Lima erred as to the date on which Mr. L. should begin receiving subsistence benefits. BC also argues that Judge Lima erred in increasing Mr. L.'s compensation rate from \$195 to \$205 per week. The Commission addresses each of BC's arguments below.

I. FINDINGS OF FACT.

BC contends that Judge Lima's decision omits material facts regarding Mr. L.'s ability to work. In particular, BC contends that the circumstances of Mr. L.'s employment at Standard Plumbing, and his loss of that employment as a result of failing a drug test, are relevant to Mr. L.'s ability to work. The Commission agrees that Mr. L.'s employment at Standard Plumbing is relevant to Mr. L.'s workers' compensation claim. The Commission has, therefore, stated and considered those facts in this decision.

II. PRELIMINARY FINDING OF PERMANENT TOTAL DISABILITY.

Mr. L.'s claim for permanent total disability compensation must be evaluated under the standards established by § 34A-2-413(1) of the Utah Workers' Compensation Act. Specifically, § 413(1)(b) requires that Mr. L. prove three elements: 1) He has suffered significant impairment as a result of his work accident; 2) He is permanent and totally disabled, as defined by subsection 413(1)(c); and 3) His work accident is the direct cause of his permanent total disability. These requirements are discussed below.

1) Significant impairment from work accident. Subsection 413(1)(b)(i) requires that Mr. L. prove he sustained a significant impairment "as a result of" his work accident. In judging whether Mr. L. has satisfied this requirement, the Commission does not consider any impairments that were not caused by Mr. L.'s work accident.

The Commission notes the undisputed evidence that Mr. L.'s work accident caused mild optic neuropathy in his left eye, traumatic brain injury, migraine headaches, acute stress disorder and major depressive disorder. These work-related conditions constitute a permanent 14% whole person impairment, which is a significant impairment within the meaning of § 413(1)(b)(i).

2) Permanent total disability. Subsection 413(1)(b)(ii) requires that Mr. L. prove he is permanently totally disabled according to the four-part definition set out in subsection 413(1)(c)(i) through (iv). Each of the four components of 413(1)(c) are summarized and discussed below.

a) The employee is not gainfully employed. Subsection 413(1)(c)(i) requires a finding that “the employee is not gainfully employed.” The evidentiary record establishes that Mr. L. is not gainfully employed. However, BC argues the Commission should look beyond the plain language of subsection 413(1)(c)(i) and consider the reasons why Mr. L. is not gainfully employed. The Commission rejects this argument. When a statute is clear and unambiguous, the Commission must apply the statute according to its plain language. Nothing in subsection 413(1)(c)(i) authorizes the Commission to evaluate the reasons for Mr. L.’s lack of employment. To the contrary, subsection 413(1)(c)(i) only permits the Commission to determine whether Mr. L. is, or is not, gainfully employed. As noted above, Mr. L. is not gainfully employed. Consequently, he satisfies the requirement of subsection 413(1)(c)(i).¹

b) Impairments limiting basic work activities. Subsection 413(1)(c)(ii) requires that the Commission conclude “the employee has an impairment or combination of impairments that limit the employee’s ability to do basic work activities.” This factor takes into account **all** Mr. L.’s impairments, regardless of cause. Furthermore, this factor only requires that the impairments “limit” his ability to do basic work activities. The Commission views the term “basic work activities” as referring to common activities shared in a wide variety of occupational settings, rather than the unique requirements of any particular job. In this sense, the term includes the abilities to report for work with reasonable regularity, some degree of physical flexibility, strength and endurance, sufficient mental capacity, the ability to communicate, and other basic abilities.

Mr. L.’s limitations from his work and non-work impairments include borderline intellectual functioning, developmental reading disorder, mild optic neuropathy in his left eye, traumatic brain injury, migraine headaches, acute stress disorder and major depressive disorder. As a result of these conditions, Mr. L. has difficulty retaining information, understanding instructions, completing tasks, and going out in public. The Commission concludes that these impairments limit Mr. L.’s ability to perform basic work activities such as reporting for work, understanding work assignments, communicating with supervisors, co-workers and customers, and actually performing work tasks. The Commission therefore concludes Mr. L. has satisfied the requirements of subsection 413(1)(c)(ii).

c) Inability to perform essential functions of past work. Subsection 413(1)(c)(iii) requires that “the industrial . . . impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial

1 The Commission notes that other parts of § 413(1)’s test for permanent total disability do touch on the reasons for an injured worker’s unemployment. For example, subsection 413(1)(b)(iii) requires proof that the industrial accident is the “direct cause” of the alleged permanent total disability. Likewise, provisions of § 413(1)(c) look to whether the injured worker can perform basic work activities, the essential functions of his or her pre-injury work, or other work reasonably available.

accident” Here, the focus is limited to work-related impairments and their effect on Mr. L.’s ability to perform the essential functions of his pre-injury work. Mr. L.’s only significant pre-injury work was as a tow-truck driver. Mr. L.’s unchallenged testimony and the uncontroverted medical record establish that his traumatic brain injury, acute stress disorder and major depressive disorder prevent him from performing the essential tasks of a tow-truck driver. Mr. L.’s work-related impairments are therefore sufficient to satisfy this part of subsection 413(1)(c)’s definition of permanent total disability.

d) Ability to do other work. This final part of subsection 413(2)(c) requires the Commission to consider whether Mr. L. can do other work that is reasonably available to him, taking into account his age, education, past work experience, medical capacity and residual functional capacity.

Mr. L. is relatively young and has generally recovered his physical strength, although he continues to suffer from mild optic neuropathy in his left eye and frequent migraine headaches. On balance, it appears that Mr. L. can perform the purely physical aspects of most jobs. However, Mr. L.’s mental and psychiatric limitations are more seriously disabling. As already stated, Mr. L. suffers from borderline intellectual functioning, developmental reading disorder, traumatic brain injury, acute stress disorder and major depressive disorder. As summarized by Dr. Mooney, Mr. L. requires psychiatric help “before attempting the challenges and stresses of work retraining and eventual return to work.” Furthermore, the Social Security Administration has already determined that Mr. L. is unable to engage in any gainful employment. The Commission therefore concludes that Mr. L.’s mental and psychological problems prevent him from performing the types of work that might be reasonably available to him.

The Commission notes BC’s argument that Mr. L.’s work at Standard Plumbing demonstrates an ability to work as a delivery driver. However, Mr. L.’s uncontradicted testimony establishes that he obtained employment with Standard Plumbing only through the assistance of the Easter Seals organization. Then, Mr. L. required continuous assistance from his supervisor in order to perform his job duties. Mr. L.’s work at Standard Plumbing under these special and unusual circumstances does not establish that Mr. L. can work in an unsheltered environment, where he would be subject to the conditions and expectations of the competitive labor market. The Commission therefore concludes that Mr. L. cannot perform other work reasonably available to him.

In summary, the Commission concludes that Mr. L.’s circumstances meet each of the four prongs of subsection 413(1)(c)’s definition of permanent total disability.

3. Work accident as “direct cause” of disability. The final element Mr. L. must prove is that his work injuries are the direct cause of his permanent total disability. Mr. L. had no difficulty performing his duties as a tow-truck driver for the 14 years preceding March 3, 2001. Then, as a result of his work-related injuries, he suffered serious psychological problems that combined with his preexisting mental limitations to prevent him from returning to work as a tow-truck driver, or turning to any other type of work that is reasonably available to him.

BC argues that, because Mr. L. lost his job with Standard Plumbing for marijuana use, it is his drug use rather than his work injuries that is the “direct cause” of Mr. L.’s disability. The Commission views BC’s argument as inconsistent with the terms of subsection § 413(1)(b)(iii).

Mr. L. was a low-functioning individual who, despite his limitations, found a niche as a tow-truck driver. After he was severely beaten at work, he developed psychological injuries that prevent him from returning to his old line of work and preclude other work that might be available to someone with his limitations. Thus, there is a direct causal connection between Mr. L.’s work-beating and his disability. And the fact that Mr. L. lost his sheltered employment with Standard Plumbing due to marijuana use does not destroy the direct causal connection between Mr. L.’s work injuries and his permanent total disability.

III. COMMENCEMENT OF SUBSISTENCE BENEFITS.

Because Mr. L. has satisfied all § 413(1)’s requirements for a preliminary determination of permanent total disability, he is entitled to payment of subsistence benefits pursuant to § 413(6)(b)(I). Judge Lima ordered BC to begin those payments on September 13, 2003, which corresponds to the date Mr. L. was terminated by Standard Plumbing. BC argues it should not be required to pay subsistence benefits for the period Mr. L. was unemployed as a result of marijuana use.

While BC’s argument has some emotional appeal, BC cites no statutory or decisional authority for the argument. However, the Utah Court of Appeals has considered an analogous situation in *King v. Industrial Commission*, 850 P.2d 1281 (Utah App., 1993). In *King*, the employer argued it was the injured worker’s incarceration, rather than a lack of light-duty work, that prevented the injured worker from returning to work. After evaluating the underlying principles of the Utah Workers’ Compensation Act, the Court held as follows (emphasis added):

. . . the absence of a statutory provision limiting workers’ compensation benefits upon a claimant’s incarceration mandates a conclusion that temporary total benefits should be awarded to King. **Moreover, the Utah Workers’ Compensation Act is based on contract principles and an employee’s right to benefits arises when he suffers a work-related injury. Absent an explicit statutory provision, the Industrial Commission is not free to reduce statutorily-created benefits.**

The mandatory language of subsection 413(6)(b)(i) provides that, upon a preliminary finding of permanent total disability, the Commission “shall order the initiation of permanent total disability compensation to provide for the employee’s subsistence.” From the evidence the parties have presented in this case, the Commission concludes that Mr. L. met § 413(1)’s standards for permanent total disability as of September 13, 2003. By directive of subsection 413(6)(b)(i), the Commission must order payment of subsistence benefits as of that date.

IV. COMPENSATION RATE.

Judge Lima's decision increased Mr. L.'s rate of compensation for temporary total and permanent partial disability from \$195 to \$205. BC argues that Judge Lima erred in taking this action because the issue was neither raised by the parties nor litigated in the course of these proceedings.

In considering this issue, the Commission notes that Mr. L.'s application for hearing does not include a claim for any additional temporary total or permanent partial disability compensation. Furthermore, Mr. L.'s pre-trial disclosure form specifically states that the only issue to be litigated was his claim for permanent total disability. And Mr. L.'s arguments and evidence at hearing were similarly confined to the issue of permanent total disability compensation.

As the moving party, Mr. L. had the opportunity to frame the issues to be adjudicated in this proceeding. Either by design or oversight, he did not raise the issues of his temporary total or permanent partial compensation rates. Consequently, BC had no notice that those issues would be addressed. In light of these circumstances, the Commission considers it unfair to increase BC's liability. The Commission therefore sets aside that part of Judge Lima's decision which raised Mr. L.'s temporary total and permanent partial compensation rates from \$195 to \$205 per week.

ORDER

1. The Commission accepts BC's argument that findings of fact are necessary regarding Mr. L.'s employment at Standard Plumbing and, therefore, incorporates such facts into this decision.

2. The Commission concludes Mr. L. has satisfied § 413(1)'s requirements for a preliminary determination of permanent total disability compensation.

3. The Commission concludes Mr. L. is entitled to subsistence benefits effective September 13, 2003, and continuing until further order of the Commission.

4. The Commission sets aside that part of Judge Lima's decision raising Mr. L.'s compensation rate for temporary total and permanent partial disability.

5. Because BC has elected to submit a rehabilitation/reemployment plan for Mr. L. pursuant to subsection 413(6)(a), the Commission remands this matter to Judge Lima for evaluation and, if appropriate, implementation of the plan.

It is so ordered.

Dated this 12th day of June, 2006.

R. Lee Ellertson
Utah Labor Commissioner